



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JANE DOE and CHARLES BOONE,

Plaintiffs Below, Appellants,

v.

WILMINGTON HOUSING AUTHORITY
and FREDERICK S. PURNELL, SR., in his
capacity as Executive Director of the
Wilmington Housing Authority,

Defendants Below, Appellees.

No. 403, 2013

Certification of Questions of Law
from the United States Court of
Appeals for the Third Circuit
No. 12-3433

APPELLANTS' SECOND AMENDED OPENING BRIEF

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Nature of Proceedings

By Order dated July 30, 2013 (Exhibit 1), this Court accepted certification of questions presented by the United States Court of Appeals for the Third Circuit in a decision dated July 18, 2013 (Exhibit 2), pursuant to Delaware Supreme Court Rule 41 and Article IV, §11(9) of the Delaware Constitution.

This case was originally filed in the Delaware Court of Chancery, and thereafter removed to the United States District Court for the District of Delaware on June 1, 2010.

On July 27, 2012, the District Court granted summary judgment in favor of the Wilmington Housing Authority (“WHA”) and denied summary judgment requested by Jane Doe and Charles Boone (“Residents”). *Doe v. Wilmington Hous. Auth.*, 880 F. Supp. 2d 513 (D. Del. 2012) (A001–A028). Residents timely appealed that decision to the United States Court of Appeals for the Third Circuit.

In their appeal, Residents asked the Third Circuit to certify to this Court questions of state law involving the interpretation and application of Article I, § 20 of the Delaware Constitution in connection with policies adopted by WHA and imposed on Residents, that restrict the rights of Residents guaranteed by Article I, § 20 of the Delaware Constitution.

Summary of Arguments

1. Under Article I, § 20 of the Delaware Constitution, WHA may not prohibit its residents, household members, and guests from displaying or carrying a firearm in a common area, including when the firearm is not being transported to or from a resident's housing unit or is not being used in self-defense.

2. Under Article I, § 20 of the Delaware Constitution, WHA may not require its residents, household members, and guests to have available for inspection a copy of any permit, license, or other documentation required by state, local, or federal law for the ownership, possession, or transportation of any firearm, including a license to carry a concealed weapon as required by 11 DEL. C. §1441, on request, when it is alleged that there is reasonable cause to believe that the law or policies have been violated.

Statement of Facts

Residents reside in public housing facilities owned or managed by WHA in Delaware.¹ WHA is a Delaware non-profit entity created pursuant to 31 DEL. C. § 4303, that provides housing to low-income families and individuals in the City of Wilmington. WHA is a creature of statute and Delaware statutes confer upon WHA circumscribed powers, such as: to acquire property, improve living and housing conditions, construct facilities, borrow money, and sue and be sued. *See* 31 DEL. C. §§ 4302, 4308. Appellee Frederick S. Purnell, Sr. is WHA's executive director.

The necessary facts for purposes of addressing the certified issues before this Court are not in dispute and are summarized in the decision of the United States Court of Appeals for the Third Circuit dated July 18, 2013, presenting its request to this Court for certification of questions of law, in relevant part, as follows:

On October 25, 2010, the WHA adopted a new firearms² policy for its public housing units.... The Revised Policy provides in relevant part that residents, household members, and guests:

(3) Shall not display or carry a firearm or other weapon in any common area, except where the firearm or other weapon is being transported to or from the resident's

¹ *Doe v. Wilmington Hous. Auth.*, No. 12-3433, Slip Op. at 3 (3d Cir. July 18, 2013) (Exhibit 2).

² This Revised Policy was adopted after the Complaint was filed in this case challenging the original WHA Policy that imposed a complete ban on possession of all firearms in residential units. The penalties for violation of the original policy included eviction. *Id.* at 4-5.

unit, or is being used in self-defense. [“Common Area Policy”]

(4) Shall have available for inspection a copy of any permit, license, or other documentation required by state, local, or federal law for the ownership, possession, or transportation of any firearm or other weapon, including a license to carry a concealed weapon as required by 11 DEL. C. § 1441, upon request, when there is reasonable cause to believe that the law or this Policy has been violated. [“Reasonable Cause Policy”]

On December 13, 2010, the WHA replaced The Park View’s House Rule 24 with amended Rule 24, which was substantially identical to the Revised Policy.³

Residents are challenging the Common Area Policy and the Reasonable Cause Policy, which together with The Park View’s House Rule 24 are referred to collectively as the “Revised Policy.” (A029).

³ *Id.* at 4–5. Appellant Jane Doe lives in an apartment building managed by WHA, called The Park View.

Argument

I. Article I, § 20 of the Delaware Constitution Is Not a Substantially Similar Counterpart to the Second Amendment of the United States Constitution

(1) Question Presented

Whether Article I, § 20 of the Delaware Constitution, which is not a mirror image of its federal analog, recognizes broader rights than the Second Amendment of the United States Constitution.

(2) Scope of Review

When an issue is presented on certification, “this Court must review the certified question in the context in which it arises.” *Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 39 (Del. 1996). This Court applies a *de novo* standard of review to legal and constitutional questions. *Ridgeway v. State*, 67 A.3d 1023, at ¶ 7 (Del. 2013) (table).

(3) Merits of Argument

Delaware courts generally interpret the Delaware Bill of Rights more broadly than federal courts interpret the Federal Bill of Rights, and § 20 should be read consistent with that jurisprudential approach. *See, e.g., State v. Holden*, 54 A.3d 1123, 1128 (Del. Super. Ct. 2010) (acknowledging that “the Delaware Constitution affords greater protection than the United States Constitution” and compiling supportive Delaware authority).

The Delaware Constitution affords more and broader protection than the Second Amendment, and the District Court erroneously predicted how the Delaware Supreme Court would rule on the state-law issues now before this Court.⁴

Article I, § 20 of the Delaware Constitution provides: “A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.” By contrast, the Second Amendment to the U.S. Constitution states: “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” U.S. CONST. amend. II.

In a faulty prediction of how this Court would rule, the District Court held that WHA’s Revised Policy does not violate Residents’ rights under § 20, stating:

Nothing in the language of the Delaware constitutional provision speaks directly to the possession of firearms in common areas of public housing facilities. Thus, the Court predicts that, if faced with the instant dispute, the Delaware Supreme Court, in interpreting the Delaware Constitution, would look to . . . [federal authority] . . . construing the Second Amendment.”

⁴ In a treatise on the Delaware Constitution it was observed that § 20: “appear[s] to afford greater protections under the Delaware Constitution than the protections of the Second Amendment to the United States Constitution.” Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 67 (2002) (A032).

Doe v. Wilmington Hous. Auth., 880 F. Supp. 2d 513, 539 (D. Del. 2012) (A026).

Residents disagree with the District Court’s assumption of how this Court would interpret Article I, § 20.⁵

Article I, § 20, according to the synopsis of the House Bill by which it was enacted, was added to the Delaware Constitution in 1987 to “explicitly protect[] the traditional lawful right to keep and bear arms.” H.B. 554, 133rd Gen. Assemb. (Del. 1986) (A033); H.B. 30, 134th Gen. Assemb. (Del. 1987) (A034). Although Delaware courts may look to federal precedent when state and federal provisions are “substantially similar,” where the underlying intent of the Delaware General Assembly is to provide more protection than the federal counterpart, that precedent becomes less influential.⁶ *See Jones v. State*, 745 A.2d 856, 864 (Del. 1999) (conducting a thorough analysis of the textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes before holding that Article I, § 6 of the Delaware Constitution provides more protection than its federal counterpart, the Fourth Amendment).

⁵ The District Court correctly held that Residents have standing to assert their constitutional claims because they “suffer an actual and imminent threat of an injury-in-fact that is personal to them by being threatened with eviction solely as a result of engaging in what they contend are protected Second Amendment rights.” *Doe*, 880 F. Supp. 2d at 522–23 (A011).

⁶ Notably, following § 20 is the statement: “WE DECLARE THAT EVERYTHING IN THIS ARTICLE IS RESERVED OUT OF THE GENERAL POWERS OF GOVERNMENT HEREINAFTER MENTIONED.” DEL. CONST. art. I (end) (full capitalization in original). *See generally* Randy J. Holland, ed., *The Delaware Constitution of 1897: The First One Hundred Years* 79, nn.23–24 (1997) (discussing various interpretations of the foregoing statement).

Delaware courts have **not** indicated that they view § 20 and the Second Amendment of the United States Constitution as “substantially similar.” Even when describing state and federal statutory provisions as “nearly identical,” Delaware has construed their protections differently. *Delaware State Univ. v. Delaware State Univ. Chapter of the Am. Ass’n of Univ. Professors*, 2000 Del. Ch. LEXIS 83, at * 45 (Del. Ch. May 9, 2000) (citing *Wilmington v. Wilmington Firefighters Local 1590*, 385 A.2d 720 (Del. 1978)). The meager case law on § 20 reveals that Delaware courts look to precedent from its sister states—not from the federal courts—to interpret the broad protections afforded by § 20,⁷ which supports the argument that Delaware courts do **not** view the Second Amendment and § 20 as being “substantially similar.” *See Griffin v. State*, 47 A.3d 487, 490 (Del. 2012) (“*Griffin II*”) (comparing § 20 to analogous constitutional provisions of other states, but not to the Second Amendment).

A. Delaware Courts Recognize Broader Protections for State Constitutional Guarantees.

Delaware historically has relished its sovereignty to afford greater rights and protections than provided by the Federal Constitution. *See State v. Ranken*, 25 A.3d 845, 855 (Del. Super. Ct. 2010) (recognizing that “Delaware has a history of

⁷ While the Delaware Superior Court looked to federal Second Amendment precedent to define the word “arms,” no Delaware court has interpreted the scope of § 20 to be merely coextensive with the Second Amendment. *State v. Griffin*, 2011 WL 2083893, at * 7 n.62 (Del. Super. Ct. May 16, 2011) (“*Griffin I*”) (holding that a steak knife is encompassed by the word “arms”), *rev’d on other grounds*, 47 A.3d 487 (Del. 2012).

expanding and jealously guarding the rights of its citizens in different areas of constitutional law”); *see also Sanders v. State*, 585 A.2d 117, 145–46 (Del. 1990) (acknowledging that Delaware’s “judicial branch should not be foreclosed from interpreting our Constitution merely because the United States Supreme Court has interpreted similar provisions of the Federal Constitution”).

Delaware courts will not regard federal precedent as persuasive where state and federal counterparts provide different protections. *See, e.g., Jones*, 745 A.2d at 863–64 (holding that “the guarantees in the Delaware Constitution for trial by jury were originally intended to be greater than those in the United States Constitution and remain that way,” and compiling supportive authority).

The Delaware Bill of Rights “is not a mirror image of the Federal Bill of Rights,” and “Delaware judges cannot faithfully discharge the responsibilities of their office by simply” following in “lock step” with U.S. Supreme Court holdings on the Federal Bill of Rights. *Dorsey v. State*, 761 A.2d 807, 814 (Del. 2000). “[T]o hold that our Constitution is simply a mirror image of the Federal Constitution, would be relinquishing an important incident of this State’s sovereignty.” *Sanders*, 585 A.2d at 145. *See also State v. Heath*, 929 A.2d 390, 401 (Del. Super. Ct. 2006) (“numerous States . . . interpret their constitutions independently of the Federal constitution”).

For instance, in *Jones*, this Court listed several examples of the Delaware Constitution granting individuals greater rights than those afforded by the United States Constitution:

[T]he Delaware Constitution provides greater rights than the United States Constitution in the preservation of evidence used against a defendant [*Hammond v. State*, 569 A.2d 81, 87 (Del. 1989)], the right of confrontation [*Van Arsdall v. State*, 524 A.2d 3, 6–7 (Del. 1987)], the right to counsel [*Bryan v. State*, 571 A.2d 170, 176 (Del. 1990)], and the right to trial by jury [*Claudio v. State*, 585 A.2d 1278, 1289–1301 (Del. 1991)].

745 A.2d at 863–64.

In one of those examples, *Bryan*, while acknowledging that it had “not in the past construed Art. I, § 7 of the Delaware Constitution as affording defendants greater rights than the federal constitution,” this Court departed from federal precedent on the issue of whether “events occurring outside the presence of a suspect have no bearing on his ability to knowingly, voluntarily and intelligently waive his right to counsel” 571 A.2d at 176–77. In addition, citing “independent State grounds,” this Court diverged from the practice of interpreting Article I, § 7 in line with federal precedent, and held that the Delaware Constitution provides broader protections than its federal counterpart. *Id.*

Delaware likewise interprets Article I, § 6 of its Constitution to provide

broader protections than the Fourth Amendment.⁸ Ample precedential authority reveals that the Delaware legislature has in no way limited the protections offered by the Delaware Constitution, nor have the Delaware courts limited their independence to interpretations of what is protected under the federal regime.⁹

1. **WHA's Revised Policy Is Preempted by State Law.**

To protect the broad rights provided by Article I, § 20, the Delaware legislature enacted preemption statutes to ensure that other inferior governmental entities, such as statutorily created housing authorities, would not infringe upon the constitutional rights of Delaware citizens embodied in § 20. *See* 22 DEL. C. § 111 (preempting municipal governments); 9 DEL. C. § 330(c) (preempting county governments). However, the District Court predicted that this Court would rule that because WHA is not expressly listed by name in the Delaware statutory preemption provisions, this Court would not find that “WHA’s firearms policies are implicitly preempted.” *Doe*, 880 F. Supp. 2d at 540 (A027).

“‘Preemption’ refers to circumstances where the law of a superior sovereign

⁸ *See also Holden*, 54 A.3d at 1128 n.14 (explaining Delaware’s more expansive rights against search and seizure):

Further Delaware Case law expanded Delaware constitutional protections, including an enlarged level of corroboration required for an anonymous tip to satisfy probable cause, *Flonnelly v. State*, 805 A.2d 854, 859–860 (Del. 2001), probation searches must be predicated upon reasonable grounds, *Donald v. State*, 903 A.2d 315, 319 (Del. 2006) and a heightened burden above probable cause to justify a nighttime search warrant.

⁹ Notably, the Illinois Supreme Court issued a decision on September 12, 2013, recognizing that the Second Amendment extends rights beyond the confines of the home, and on that basis, invalidated a statute banning the carrying of guns outside the home. *Illinois v. Aguilar*, 2013 Ill. LEXIS 853 (Ill. Sept. 12, 2013).

takes precedence over the laws of a lesser sovereign.” *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1121 (Del. 2009). The Delaware General Assembly has enacted a comprehensive regulatory scheme respecting the right to bear arms, and has also enacted preemption statutes to prohibit inconsistent local restrictions by municipalities and county governments from attempting to regulate within this field. 22 DEL. C. § 111; 9 DEL. C. § 330(c).¹⁰ These statutes were enacted or revised at about the same time as Article I, § 20,¹¹ and are entitled to be viewed as an extension of the Delaware legislature’s intent that it alone should determine what regulations are permissible under and consistent with the rights recognized by Article I, § 20. It does not stand to reason that the General Assembly would prohibit counties and cities from interfering with the rights recognized in § 20, but allow a lesser agency, such as a housing authority with limited statutory powers, to disrespect the legislature’s purpose in enacting an amendment to the Bill of Rights.¹²

¹⁰ Judicial decisions in other states with constitutional guarantees of the right to bear arms have taken this approach. The Maine Constitution provides: “Every citizen has a right to keep and bear arms and this right shall never be questioned.” ME. CONST. art. I, § 16. *See Doe v. Portland Hous. Auth.*, 656 A.2d 1200, 1203 (Me. 1995), holding that a state preemption law “was enacted to reinforce the [right-to-bear arms] amendment and to ensure uniformity in the regulation of guns,” invalidated a municipal ordinance banning firearms in public housing. Further, *Schwanda v. Bonney*, 418 A.2d 163, 166–67 (Me. 1980), invalidated an ordinance restricting concealed-weapon licensees because “the need for uniform application of the concealed weapons law precludes local regulation resulting in such inconsistencies.”

¹¹ *See* 65 Del. Laws ch. 133 (1985); 65 Del. Laws ch. 278 (1986).

¹² If the Common Area Policy is stricken, then the Reasonable Cause Policy is moot. Residents are required to “have available for inspection a copy of any permit, license, or other documentation” required by law to possess a firearm, including a license to carry a concealed

B. The District Court Should Not Have Relied on Federal Precedent to Construe the Delaware Constitution.

When Delaware adopted § 20 in 1987, before the U.S. Supreme Court had held the Second Amendment applicable to the states,¹³ federal precedent at that time (which was subsequently overruled) held that the Second Amendment did not even protect individual rights, much less a right to have arms for self-defense, hunting, and recreational use.¹⁴ See *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (holding that the Second Amendment would protect possession of a firearm only for “militia-related activity”); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (averring that the Second Amendment “was not adopted with

weapon, when there is purported “reasonable cause to believe that the law or this Policy has been violated.” (A029). Given that the Revised Policy is void under § 20, WHA cannot demand that Residents produce documents if the Revised Policy is suspected of being violated. Nor does WHA, even if it believes that a law is being violated, have legal authority to require Residents to produce a license or permit. Not even a law enforcement officer, not to mention a private person, has such authority, which is precluded by at least three constitutional rights—the right to keep and bear arms, the right against unreasonable search and seizure, and the right against self incrimination.

By comparison, for a law enforcement officer to conduct a similar confrontation: the officer must suspect not only that criminal activity is afoot, but also that “the detainee is armed and presently dangerous.” *State v. Henderson*, 892 A.2d 1061, 1064 (Del. 2006) (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)) (emphasis added).

¹³ *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), held the Second Amendment applicable to the states in 2010.

¹⁴ Reviewing the historical context in which a constitutional provision was written has been described as a helpful approach to understanding the text. See generally Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 400–01 (2012) (discussing the historical context in which the Second Amendment was written to help one understand that the reference to the right to keep and bear arms was a recognition of a preexisting fundamental right, as opposed to conferring a new right) (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Scalia, J.)) (A036–A037); see also Stephen P. Halbrook, *Securing Civil Rights: Freedmen, The Fourteenth Amendment and the Right to Bear Arms* 95 (2010) (“By passing the [second Freedmen’s Bureau Act of 1868], Congress reaffirmed . . . that the rights of personal security and personal liberty included ‘the constitutional right to bear arms.’”) (A039).

individual rights in mind, but as a protection for the States in the maintenance of their militia organizations”).

Delaware has always protected the individual right to bear arms—both before and after the Second Amendment was made applicable to the states¹⁵—and Delaware’s General Assembly could not have intended to incorporate federal case law into § 20 that was not fully developed on these issues in 1987.¹⁶ Moreover, as cited above, in many cases federal decisions on this topic as of 1987 were directly contrary to the express language of Article I, § 20.

Historically, the Delaware Supreme Court looks to federal precedent to interpret similar state constitutional provisions only where the language of the state and federal provisions are identical. *Sanders*, 585 A.2d at 144 (expressly recognizing that “the language of Article I, Section 11 is essentially identical to that of the Eighth Amendment” in using federal precedent to interpret Article I, § 11 of the Delaware Constitution). Typically, however, Delaware does not rely

¹⁵ More than twenty years after Article I, § 20 was adopted, in *Heller*, 554 U.S. at 599, the U.S. Supreme Court held that the Second Amendment guarantees an individual right to keep and bear arms for self-defense, and other lawful activities. By comparison, during the general period in history that the Second Amendment was adopted, Delaware **required** large parts of the populace to keep a firearm—not merely recognizing a right to possess a firearm. *See generally* Militia Act of 1793, in 2 Del. Laws 1136 (1793) (a Delaware law that required each “able bodied white male citizen” aged 18 to 44, to keep a firearm).

¹⁶ One constitutional scholar, whose work has been cited in Second Amendment decisions by the United States Supreme Court, has explained why the Delaware Constitutional Convention of 1791 did not provide for recognizing the right to bear arms, even though there “was little disagreement about confirming an individual right to bear arms in self-defense.” Stephen P. Halbrook, et al., *Delaware Lawyer*, Winter 2011/2012, at 15 (citing Stephen P. Halbrook, *The Founders’ Second Amendment* 295–98 (2008)).

on federal precedent in construing state constitutional provisions, particularly those that are not identical.

Indeed, no Delaware court has stated or even implied that § 20 and the Second Amendment are “essentially identical,” or that they provide the same protections. Of course, a plain reading of the text of each provision reveals obvious and substantial differences. The Second Amendment begins with its “well regulated militia” clause, grounds the right in “the people,” and declares that the right “shall not be infringed,” but includes no purpose clause. Section 20, by contrast, grounds the right “in a person,” and explicitly declares that the right not only to keep, but also to bear, arms extends to “the defense of self, family, home and State, and for hunting and recreational use.”

In short, the Delaware courts generally interpret the Delaware Bill of Rights more broadly than federal courts interpret the Federal Bill of Rights, and there is no sound basis to deviate from that practice with regard to Article I, § 20 of the Delaware Constitution.

II. The Protections of Article I, § 20 Are Not Limited to the Home

(1) Question Presented

Whether Article I, § 20, by its terms, extends the right to bear arms outside the home.

(2) Scope of Review

See supra p. 5.

(3) Merits of Argument

A. Article I, § 20 Is Not Limited to the Home.

The prohibition on possession of a firearm in the common areas violates the clear text of Article I, § 20: “A person has the right to keep and bear arms for the defense of self, family, [and] home” As a categorical matter, without the need to apply any judicial gloss or standard of review, the prohibition is invalid, as it explicitly bans the right to “bear arms” for defensive purposes.

The seminal case of *District of Columbia v. Heller*, explained that the core, fundamental purpose of the right to bear arms in the Second Amendment is to allow citizens to protect themselves in their homes. 554 U.S. at 630. Then *McDonald v. City of Chicago* clarified that “‘the need for defense of self, family, and property is most acute’ in the home,” thereby acknowledging that the right to bear arms extends beyond the home—although to a lesser degree. 130 S. Ct. at 3042 (citing *Heller*, 554 U.S. at 679); *see also Moore v. Madigan*, 702 F.3d 933,

935 (7th Cir. 2012) (Seventh Circuit reasoned that: “Both *Heller* and *McDonald* do say that ‘the need for defense of self, family, and property is most acute’ in the home, but that doesn’t mean it is not acute outside the home.”) (citation omitted). Indeed, the Seventh Circuit interprets *Heller* to mean that the Second Amendment (which is more limited than Article I, § 20) “**confers a right to bear arms for self-defense, which is as important outside the home as inside.**” *Moore*, 702 F.3d at 942 (emphasis added). *See also id.* at 941 (criticizing the Second Circuit’s opinion in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. Nov. 27, 2012), for suggesting “that the Second Amendment should have much greater scope inside the home than outside simply because other provisions of the Constitution have been held to make that distinction.”).

The Second Amendment, even as interpreted in *Heller* and *McDonald*, is more narrow in scope than Article I, § 20, but cases construing the Second Amendment are helpful to illuminate a floor or baseline—below which Article I, § 20 cannot descend. Section 20 provides: “A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.” DEL. CONST. art. I, § 20. The words “keep” and “bear” are not synonyms.

By the very terms of § 20, in Delaware the right to “bear arms” is not limited to one’s home. *See Moore*, 702 F.3d at 935–36. Even when construing the more

limited scope of the Second Amendment, Judge Posner reasoned in *Moore* that: “*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home, as when it says that the amendment ‘guarantee[s] the individual right to possess and carry weapons in case of confrontation.’

Confrontations are not limited to the home.” *Id.* (quoting *Heller*, 554 U.S. at 592).¹⁷ While the defense of home would have that nexus, the defense of self, family, and state is certainly not limited to one’s house. *Id.* at 936. **“To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.”** *Id.* at 937

(emphasis added). *See also* DEL. CONST. pmb. (“all men have by nature the rights of . . . defending life and liberty, of acquiring and protecting reputation and property.”).¹⁸

While § 20 does not allow for an absolute and unfettered right, by its express terms it extends to areas outside of the home. The recent Seventh Circuit decision in *Moore, supra*, underscores this core point. The need for self-defense may arise wherever a person happens to be, and the right of self-defense must follow. *See*

¹⁷ The phrase “to keep and bear” arms in contemporary parlance would equate with “possess and carry.”

¹⁸ The Preamble to the Delaware Constitution also recognizes the right to self-defense, and as explained in *Griffin*, 47 A.3d at 491, and *Heller*, 554 U.S. at 608–09, it would not be rational to interpret the phrase “bear arms” to be confined to one’s home. *See* Definition of “Bear”: WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 137 (1986 ed.) (“to move while holding up and supporting”) (A042); BLACK’S LAW DICTIONARY 140 (5th ed. 1979) (“To support, sustain, or carry.”) (A045) (this edition of the iconic law dictionary was published the closest in time prior to the date that Article I, § 20 was enacted).

also *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (Niemeyer, J., concurring) (“If the Second Amendment right were confined to self-defense in the home, the [Supreme] Court would not have needed to express a reservation for ‘sensitive places’ outside of the home.”)). See also *Drake v. Filko*, 2013 WL 3927735, at * 13 (3d Cir. July 31, 2013) (Hardiman, J. dissenting) (asserting that the opinion of the two-person majority,¹⁹ “is based on an incorrect reading of *Heller* and *McDonald*, both of which indicate that the Second Amendment extends beyond the home”).

Residents are entitled to the same fundamental rights as other Delaware citizens, *i.e.*, to keep and bear arms consistent with the laws of Delaware and the United States. WHA has suggested no principled basis for limiting the constitutional rights of public housing residents more so than those who can afford to provide for their own housing, in a manner not applicable to other citizens who are not dependent on the government for a place to live.²⁰

¹⁹ Interestingly, the two-person majority on the Third Circuit panel in *Drake* from which Judge Hardiman dissented, included District Judge Leonard Stark, who was sitting on the panel by designation. Judge Stark wrote the District Court opinion in the case at hand.

²⁰ In his concurrence to the Supreme Court’s decision in *McDonald*, Justice Clarence Thomas referred to states that “enacted legislation prohibiting blacks from carrying firearms without a license,” 130 S. Ct. at 3082, and quoted Frederick Douglass as stating that “the black man has never had the right either to keep or bear arms,” which would be remedied by adoption of the Fourteenth Amendment. *Id.* at 3083 (Thomas, J., concurring).

The legislation that Justice Thomas referred to above that restricted the rights of blacks, especially in the southern states around the time of the Civil War, were often referred to as Black Codes. Delaware had its own version of Black Codes. For example, in 1863, in the midst of the Civil War, the provision in a law enacted in 1832 providing for a license allowing possession of a firearm by a free black person was repealed, and the penalty for violation was greatly

The WHA Common Area Policy effectively eliminates a WHA resident's ability to defend herself with a firearm in the "common areas" of her residential facility, making it virtually impossible for her to use firearms for the core lawful purpose of self-defense in those other parts of her residential building. The Common Area Policy does not merely "regulat[e] the manner in which persons may lawfully exercise their Second Amendment rights," as the District Court held; rather it infringes on a fundamental right protected by the Delaware Constitution. *Doe*, 880 F. Supp. 2d at 533 (A021).

The District Court held that "the 'common areas' covered by the Common Area Provision are not the 'hearth and home,'" such that those areas fall within the "core" of the Second Amendment's protections. *Doe*, 880 F. Supp. 2d at 529 (A017). However, **the District Court also held that "the 'common areas' are also part of Plaintiffs' residences. The laundry rooms and TV rooms, for**

increased. The enactment provided that "free negroes and free mullatoes are prohibited from owning or having in their possession, a gun, pistol, sword, or any warlike instrument" See An Act in Relation to Free Negroes and Mullatoes, § 7, Ch. 305, Mar. 18, 1863, in 12 Del. Laws 332 (1863). See generally Harold B. Hancock, *Delaware During The Civil War* 30 (1961) (discussing the response of the General Assembly in 1862 to a proposal by President Lincoln to end slavery in Delaware by compensating its slave owners, as follows: "when the people of Delaware desire to abolish slavery within her borders, they will do so in their own way, having due regard to strict equity."). Although we do not ascribe ill motives to the policies of WHA and its authors, the net result of the Revised Policy is a disparate impact on Residents and similar minorities who are subject to the Revised Policy of WHA and who are being deprived of the full enjoyment of the full panoply of constitutional rights that other less-marginalized citizens enjoy, simply because, in this instance, Residents cannot provide for their own housing.

instance, are like similar rooms that are typically found in private residences.”

Doe, 880 F. Supp. 2d at 532 (A020).²¹

The Delaware Superior Court’s analysis of “what constitutes an individual’s ‘home’” for purposes of the home-possession exception to Delaware’s concealed-carry law in *Griffin I*, suggests that the District Court in the case *sub judice* improperly narrowed the scope of § 20. *See* 2011 WL 2083893, at * 7 n.59 (reversed and remanded on different grounds). There, the court stated: “Treatises construing statutory exceptions to carrying a concealed deadly weapon indicate that, generally, the exception is implicated if one **‘lives on’ the premises at issue.**” *Id.* (emphasis added). Further, in *Griffin II*, the Delaware Supreme Court reasoned that: “it would be unreasonable to ‘restrict the manner in which one could carry a legal weapon from room to room within one’s home . . .’” 47 A.3d at 491. This reasoning should apply to allow one to exercise the legal rights to carry a firearm outside one’s private dwelling, in rooms and other areas within an apartment building, as here, that are part of Residents’ living spaces that are not private or exclusive areas.

²¹ The WHA Revised Policy, which provides that WHA residents “Shall comply with all local, state, and federal legal requirements applicable to the ownership, possession, transportation, and use of firearms or other weapons. . . ,” would have been sufficient to serve WHA’s interest in safety without infringing on Residents’ fundamental right to bear arms. WHA Revised Policy ¶ 1 (A029). In a similar situation in California, the San Francisco Housing Authority, in response to a Second Amendment challenge, amended its firearms policy to prohibit only those activities which violate applicable law. *See Guy Montag Doe, et al. v. San Francisco Hous. Auth., et al.*, No. CV-08-03112 (N.D. Cal. Jan. 12, 2009) (stipulation of settlement and dismissal) (A046–A049). WHA should have done the same.

WHA suggests that hypothetical and potential abuses of the legal right to “openly carry” firearms provides a rationale for their unjustified restriction of the constitutional rights that other Delaware citizens, who do not depend on public housing, can enjoy. Reliance on the potential abuse of the right to openly carry firearms, is not a justification for restricting the rights of Residents who would not abuse the right and who may, for example, have a license to carry a concealed firearm.²² Residents should be permitted to exercise all their rights, subject to existing federal and state law—not merely those rights the WHA might deem appropriate for Residents to enjoy based on a paternalistic and condescending Policy. If WHA sensibly required Residents to be merely subject to applicable state and federal law, and not additional discriminatory restrictions, this litigation could have been avoided.

²² Any person, other than a “person prohibited” under applicable Delaware law, could openly carry a gun while walking through Rodney Square in Downtown Wilmington. See 11 DEL. C. § 1448 (effective Sept. 1, 2011) (identifying “persons prohibited”).

Any person who wishes to exercise their rights to “open carry” in Delaware runs the risk of being detained or arrested (perhaps unjustly) for a number of criminal offenses that could be based on an officer’s subjective impression of the situation. For instance, if a police officer believes that a person openly carrying a firearm intends to: “place[] another person in fear of imminent physical injury” (11 DEL. C. § 602(a)); “to cause anxiety, unrest, fear or personal discomfort to any person or group of persons” (11 DEL. C. § 622); or “cause[] public inconvenience, annoyance or alarm to any other person, or create[] a risk thereof” (11 DEL. C. § 1301), that person might be arrested and charged with menacing, hoax or disorderly conduct (respectively). A recent Delaware court decision recognized the tension between the theoretical and the practical aspects of this issue. “To be sure, any discussion of open carry rights has a certain air of unreality. In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police.” *Griffin I*, 2011 Del. Super. LEXIS 193, at *52 n.87 (quoting Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1521 (2009)).

III. The Revised Policy Improperly Narrows the Rights Guaranteed by Article I, § 20 of the Delaware Constitution and Cannot Withstand Applicable Scrutiny

(1) Question Presented

Whether the applicable standard of constitutional scrutiny supports a finding that the Revised Policy violates Article I, § 20 of the Delaware Constitution.

(2) Scope of Review

See supra p. 5.

(3) Merits of Argument

A. The Right to Self-Defense is the Core of the Second Amendment.

As noted, the WHA purports to prohibit Residents from exercising “the right to keep and bear arms for the defense of self, family, [and] home” in the common areas. As a categorical matter, this violation of the clear text of Article I, § 20, is void and unenforceable.

Alternatively, under either the *Hamdan* test adopted by this Court in *Griffin II*, 47 A.3d at 491, or the federal standards of strict, intermediate, and rational basis constitutional scrutiny, the restrictions imposed by the Revised Policy cannot pass constitutional muster. The crux of Residents’ fundamental right under § 20 is the right to *self-defense*—whether or not the common areas are considered part of Residents’ homes, because “the interest in self-protection is as great outside as inside the home.” *Moore*, 702 F.3d at 941 (Posner, J.) (striking down Illinois’ ban

on carrying a gun as unconstitutional under the Second Amendment). The Second Amendment, of course, only provides the minimum level of rights to self-defense.

The District Court was inconsistent in holding that the common areas of WHA are “part of [Residents’] residences,” but “are not the ‘hearth and home,’” and therefore do not fall within the “core” of the Second Amendment’s protections.²³ *Doe*, 880 F. Supp. 2d at 529, 532 (A017, A020). In so holding, the District Court rejected Residents’ argument that their claims should be analyzed using strict scrutiny, which is appropriate when a challenged provision regulates conduct within the “core” of the Second Amendment’s protections. *Id.* at 529 (A017); *see also Heller*, 554 U.S. at 634; *McDonald*, 130 S. Ct. at 3036.

That holding, however, misconstrued *Heller*, which held that the core of the Second Amendment—the “*central component* of the right itself,” is the right to self-defense. *Heller*, 554 U.S. at 599 (original emphasis); *see also id.* at 628 (“the inherent right of self-defense has been central to the Second Amendment right”); *id.* at 630 (“core lawful purpose of self defense”). The Seventh Circuit’s opinion in *Moore* further underscores *Heller*’s holding as to the scope of the right to self-defense. 702 F.3d at 941 (“[T]he interest in self-protection is as great outside as inside the home.”). The same reasoning should apply with greater force to the broader rights of self-defense articulated by the terms of Article I, § 20.

²³ The District Court did not cite either federal or state-law precedent to support this holding.

1. The Revised Policy Cannot Withstand Constitutional Scrutiny Under the *Hamdan* Test.

In *Griffin II*, this Court avoided a federal “level of scrutiny” analysis to determine if Delaware’s “concealed carry” statute was constitutional under the Delaware Constitution. 47 A.3d at 490–91. Rather, this Court considered analyses used by its sister states with comparable constitutional provisions, and ultimately adopted a three-part test used by the Wisconsin Supreme Court to decide:

whether the CCDW statute is unconstitutional as applied. First, the court must compare the strength of the state’s interest in public safety with the individual’s interest in carrying a concealed weapon. Second, if the individual interest outweighs the state interest, the court must determine, ‘whether an individual could have exercised the right in a reasonable, alternative manner that did not violate the statute.’ Third, the individual must be carrying the concealed weapon for a lawful purpose.

Id. (citing *Wisconsin v. Hamdan*, 665 N.W. 2d 785 (Wis. 2003)).²⁴ This Court can likewise apply the *Hamdan* test to determine whether the Revised Policy is constitutional under the Delaware Constitution.

a) *Balancing Interests*

First, applying the initial element of the *Hamdan* test to the facts of this case reveals that the interest of the inhabitants of public housing to carry firearms is nearly of the strongest type: “Persons residing in public housing are over twice as likely to suffer from firearm-related victimization as other members of the

²⁴ Residents recognize that the constitutional challenges in *Hamdan* and *Griffin II* were as-applied challenges, and Residents, in this matter, are asserting both a facial and an as-applied challenge to the Revised Policy.

population. There is a strong correlation between income and violent crime; thus the low-income population in public housing is especially vulnerable to gun violence.” U.S. Dept. of Hous. & Urban Dev., *In the Crossfire: The Impact of Gun Violence on Public Housing Communities* (1999), <https://www.ncjrs.gov/pdffiles1/nij/181158.pdf>. This interest is only magnified for Residents, who are elderly and less able to protect themselves.

Residents acknowledge that WHA has an interest in the safety of its public housing facilities; however, that interest does not justify the heavy-handed effect of the Common Area Policy, i.e., only allowing Residents to exercise the right to self-defense when they are inside of their units, but not recognizing their rights on the other side of the door—within the same building.²⁵ As explained in this Court’s holding in *Griffin II*: “A person’s interest in keeping a concealed weapon is strongest when the weapon is in one’s home or business and is being used for security. The state’s interest is weakest in those circumstances because the concealed weapon presents a relatively minimal threat to public safety.” 47 A.3d at 490–91. Moreover, the legislature already performed the balancing of state and individual interests in their comprehensive regulatory scheme, including the rigorous requirements for a CCDW license.

²⁵ WHA did not consider or review any relevant crime statistics in formulating the WHA Revised Policy.

Under any standard of review, it is WHA's burden to show that its chosen form of regulation (i.e., the Revised Policy) is justified. *Pagan v. Fruchey*, 492 F.3d 766, 777–78 (6th Cir. 2007) (holding that intermediate scrutiny “charges the government with the burden of justifying its chosen form of regulation. Thus, even so-called common sense decisions require some justification.”).

The state's interest must be bolstered by actual evidence. *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990, 1011 (3d Cir. 1993) (requiring probative evidence to support stated interest). However, the actual evidence does not support WHA's position in this case. There is no convincing evidence that gun control regulations, such as the Revised Policy at issue here, reduce criminal violence. *See Moore*, 702 F.3d at 937 (citing Robert Hahn, et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREV. MED. 40, 59 (2005) (identifying inconclusive correlation between firearms regulation and violence)).

To the contrary, the *Moore* Court, relying on empirical data, found that laws that prohibit gun carrying outside the home have little impact on public safety in states that utilize a permit system for public carry, like Delaware. *Moore*, 702 F.3d at 938. Further, **the evidence available “is consistent with concluding that a right to carry firearms in public may promote self-defense.”** *Moore*, 702 F.3d at 942 (emphasis added).

While there is scant data available to justify firearm restrictions, there is copious evidence to prove that there is a negative correlation between gun ownership and crime. See John R. Lott, Jr., *More Guns, Less Crime* 117–18 (3d ed. 2010) (“Indeed, the effect of gun ownership on crime is quite large: a 1 percent increase in gun ownership reduces violent crime by 4.1 percent.”); *id.* at 184 (“[T]hose who are relatively weaker physically (women and the elderly) and those who are most likely to be crime victims (blacks and those living in urban areas) tend to benefit the most from the passage of right-to-carry laws.”); *id.* at 21 (“While the support for the strictest gun-control laws is usually strongest in large cities, the largest drops in violent crime from legalized concealed handguns occurred in the most urban counties with the greatest populations and the highest crime rates.”); *id.* at 164 (“Allowing citizens without criminal records or histories of significant mental illness to carry concealed handguns deters violent crimes and appears to produce an extremely small and statistically insignificant change in accidental deaths.”).

More recent studies support the view that policies such as those imposed by WHA do not promote the safety of Residents. See, e.g., Don B. Kates and Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide*, 30 *Harvard J. Law and Pub. Pol.* 649, 660–61 (2007) (study concludes that more gun control does not lead to lower death rates or less violent crime).

Even public health experts who zealously advocate handgun controls have concluded—in the wake of *Heller*—that the empirical evidence suggests that there would be “‘relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand.’” *Moore*, 702 F.3d at 938 (quoting Philip J. Cook, Jens Ludwig, & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009)).

Because there is no justification for WHA’s oppressive Revised Policy, Residents’ fundamental constitutional rights outweigh WHA’s unsubstantiated interest in imposing over-restrictive firearm regulations.

b) Alternative Manner

The second part of the *Hamdan* test is to determine whether Residents can exercise their right to self-defense in a reasonable, alternative manner that does not violate the Revised Policy. *Griffin II*, 47 A.3d at 490. Residents posit that the Revised Policy unequivocally precludes them from benefitting from laws, such as the provision in 11 DEL. C. § 1441 for a license to carry a concealed weapon, to defend themselves in the common areas of WHA. Unless Residents are transporting a firearm to and from their apartments (which is not a “reasonable” alternative), they are prohibited from having a concealed weapon to defend

themselves in the common areas. Residents have no reasonable method to exercise their rights under Article I, § 20 of the Delaware Constitution while enjoying the common areas of their housing units.²⁶

c) Lawful Purpose

The final factor of the *Hamdan* test requires that Residents must be using firearms for a lawful purpose. *Griffin II*, 47 A.3d at 491. Residents merely seek to be subject to all the applicable state and federal laws that currently exist—but not additional limitations capriciously imposed by the discriminatory Revised Policy. The Delaware Constitution expressly allows Residents to bear arms for six enumerated purposes: “defense of self, family, home, state, hunting and recreation.” Art. I, § 20. Residents merely request that they be allowed to exercise lawful rights.

B. The Infringement of Core Constitutional Rights Implicates Strict Scrutiny.

If this Court declines to apply a categorical approach based on the constitutional text or the *Hamdan* test used in *Griffin II*, and relies on the federal levels of constitutional scrutiny, strict scrutiny should be applied. *See Turnbull v. Fink*, 668 A.2d 1370, 1379 (Del. 1995) (discussing the strict, intermediate, and rational basis standards of scrutiny in determining the constitutionality of liability limitation statutes under the Delaware Constitution).

²⁶ Moreover, the Reasonable Cause Policy presumes that Residents are violating the law. Residents should enjoy a presumption of innocence.

“A governmental action survives strict scrutiny only where the state demonstrates that the test is narrowly tailored to advance a compelling government interest.” *Id.* at 1379; *see also United States v. Marzzarella*, 614 F.3d 85, 97 n.14 (3d Cir. 2010) (same).²⁷ As shown above, WHA has not and cannot provide the requisite justification for this Court to conclude that firearms restrictions above and beyond what is acceptable under current state and federal laws will advance the safety of WHA.²⁸ (*See supra* Part III(A)(1)(a)).

Further, the Revised Policy cannot satisfy the “narrow tailoring” requirement because it violates Residents’ core fundamental right to self-defense in the home. Although safety is a compelling governmental objective, it is not an absolute, unrestricted objective that invalidates all other concerns; and it cannot, as a matter of law, justify restricting Residents’ fundamental right to self-defense where it is most necessary—in public housing where residents “are over twice as

²⁷ *Marzzarella* held that a ban on firearms with obliterated serial numbers did not have “the effect of prohibiting the possession of any class of firearms,” and thus the ban “should merit intermediate, rather than strict, scrutiny.” 614 F.3d at 97.

²⁸ Residents do not assert that § 20 permits any person to carry a concealed weapon without a license, an argument that was proffered and rejected in *Smith v. State*, 882 A.2d 762, at * 7–8 (Del. 2005) (table) (holding that § 20 does not entitle a person to conceal the weapon he carries). Rather, Residents argue that the current state and federal laws governing firearms possession, including 11 DEL. C. § 1441 (License to Carry Concealed Deadly Weapons), are sufficient, without additional regulations by public housing authorities, to ensure the safety of WHA residents and protect Residents’ fundamental constitutional rights. *See supra* n.21.

Smith, however, did not elucidate the right to “openly carry” a firearm in Delaware. Moreover, in light of this Court’s opinion in *Griffin II*, the *Smith* decision remains even less clear.

likely to suffer from firearm-related victimization”²⁹ U.S. Dept. of Hous. & Urban Dev., *In the Crossfire: The Impact of Gun Violence on Public Housing Communities* (1999), available at <https://www.ncjrs.gov/pdffiles1/nij/181158.pdf>.

Denying Residents the right to bear arms when they are in the common areas of their apartment buildings is an infringement of their core, fundamental right to protect themselves in their residences. In this case their residences happen to include residential units within a high rise apartment building.³⁰ See Wilmington Housing Authority, Park View Apartments, <http://www.whadelaware.org/Communities/parkview.php> (describing the building where Jane Doe resides as a “high rise building”).

1. Intermediate Scrutiny is Insufficient to Justify the Infringement of Fundamental Rights.

Heller forecloses the application of mere intermediate scrutiny to a regulation, such as the Revised Policy in this case, that impinges upon law-abiding citizens’ core constitutional right to self-defense. 554 U.S. at 634 (rejecting Justice Breyer’s proposed interest-balancing test, which is just another name for intermediate scrutiny). That foreclosure is equally applicable under Delaware law.

²⁹ Even if the Revised Policy enhances the public welfare to a “slight degree, the offending statute is void as an invalid exercise of the police power.” *Hamdan*, 665 N.W. 2d at 805. The reasoning of *Hamdan* was adopted by this Court in *Griffin II*, 47 A.3d at 491.

³⁰ The Delaware Superior Court’s analysis of “what constitutes an individual’s ‘home’” in *Griffin I*, further suggests that this Court would apply the strict scrutiny standard of review to Residents’ constitutional infringement claims, if the federal standards of review are applicable. 2011 WL 2083893, at * 7 n.59 (reversed and remanded on different grounds; *see supra*).

See *Turnbull*, 668 A.2d at 1379 (holding that “where the state action infringes upon a ‘fundamental right’ . . . , the more rigorous ‘strict scrutiny’ test will be applied”).³¹

That is not to say that Residents’ right to bear arms for self-defense is unfettered; however, because of “its proximity to the core of the right,” a burden on Residents’ right to self-defense in their residential buildings cannot be easily justified. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (holding Chicago’s total ban on firing ranges unconstitutional because it “severely burdens the core Second Amendment right to possess firearms for self-defense” by conditioning gun possession on range training but simultaneously forbidding range training in the city). Indeed, in *Marzzarella*, the Third Circuit expressly recognized that the Second Amendment, like the First Amendment, “is susceptible to several standards of scrutiny” 614 F.3d at 96–97. *Marzzarella* applied intermediate scrutiny to a statute criminalizing the possession of a firearm with an obliterated serial number. *Id.* at 97. The Court specifically noted that the

³¹ *Turnbull* is one of the few Delaware cases discussing the appropriate standard of review to be applied when government action infringes on constitutionally protected fundamental rights. 668 A.2d at 1379. *Turnbull* involved a constitutional challenge under both the Delaware and United States Constitutions, and required a discussion of the Equal Protection Clause of the Fourteenth Amendment. *Turnbull v. Fink*, 1994 WL 89641, at * 2 (Del. Super. Ct. Feb. 17, 1994).

Despite an exhaustive search, Residents were unable to locate any relevant case where a Delaware court employed the federal levels of scrutiny to Delaware legislation challenged **only** under the Delaware Constitution (i.e., no corresponding Federal Constitution claims that require Equal Protection analysis). Accordingly, it is unclear whether the Delaware courts employ those Equal Protection levels of scrutiny if the Equal Protection Clause is not invoked, or what levels of federal scrutiny the Delaware courts would apply.

defendant was not a **law-abiding** citizen and was not using the firearm for a **lawful purpose, as well as that the law did not ban any type of firearm**; therefore, strict scrutiny was not implicated because the statute at issue did not burden the core purpose of the Second Amendment. *Id.* at 98.

However, *Marzzarella* does not stand for the position that intermediate scrutiny is always appropriate. Nor should this Court defer to the holding in *Marzzarella* where it is not clear whether Delaware will follow in lock-step with federal Second Amendment precedent, given that § 20 provides broader rights than the Second Amendment, and Delaware's history of interpreting its state's own constitutional guarantees more broadly. In this case, if the Court does not apply the *Hamdan* test, strict scrutiny of WHA's Revised Policy is required because it infringes on law-abiding citizens' core fundamental right to self-defense.

If, however, this Court considers the constitutionality of the Revised Policy under the intermediate standard of review, WHA's mere recitation of unsubstantiated concerns about safety without supportive evidence is insufficient to withstand intermediate scrutiny. *United States v. Carter*, 669 F.3d 411, 419 (4th Cir. 2012) (remanding case where state failed to point "to any study, empirical data, or legislative findings, it merely argued to the district court that the fit [between safety and firearm possession] was a matter of common sense."). *See also Drake*, 2013 WL 3927735, at * 23 (Hardiman, J. dissenting) (criticizing

majority decision “absolving New Jersey of its obligation to show fit,” where “New Jersey has provided no evidence at all to support its proffered justification”). WHA provides no sound basis to support its defective syllogism attempting to connect the lawful use of firearms with an increase in harm to residents.

Conclusion

For these reasons, Residents Jane Doe and Charles Boone respectfully request that this Honorable Court find that the Wilmington Housing Authority’s Revised Policy violates Article I, § 20 of the Delaware Constitution.

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